No. 604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

HARRY CLIFFORD PORTER, *Petitioner*

v.

AETNA CASUALTY & SURETY COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT

JOHN L. LASKEY
RICHARD WHITTINGTON WHITLOCK
LASKEY and LASKEY
Attorneys for the Respondent
509 Albee Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CITATIONS

DECISIONS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 604

HARRY CLIFFORD PORTER, *Petitioner*

v.

AETNA CASUALTY & SURETY COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court, Youngdahl, J. (R. 27-31), is reported at 185 F. Supp. 302. The opinions of the Court of Appeals, Miller, C. J., Burger, J., and Prettyman, J. (R. 47-54), are not yet reported.

JURISDICTION

Judgment of the Court of Appeals was entered on July 13, 1961 (R. 55). Petition for rehearing *en banc* was denied on August 21, 1961 (R. 65). Petition for

certiorari was filed on September 18, 1961, and granted on December 11, 1961 (R. 66). Jurisdiction of this Court is predicated upon 28 U.S.C. 1254(1).

THE QUESTION PRESENTED

When the Committee of an incompetent veteran uses disability benefits payable to the veteran for the purchase of shares in savings institutions specifically approved by the Court for the "investment" of trust funds, are the resulting share interests "investments," in the legal sense, and, thus, *not* exempt from attachment by a judgment creditor of the incompetent?

THE STATUTE INVOLVED

> "Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. * * *"[1]

---

[1] 38 U.S.C. Section 3101(a). This is, essentially, the form in which the statute has been since its original enactment. (Act of March 3, 1873, Rev. Stat. Section 4747 (1878); World War Veterans' Act of 1924, Chapter 320, Section 22, 43 Stat. 607, 613; Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 607, 609; Act of September 7, 1958, 72 Stat. 1229.) The phrase "either before or after receipt by the beneficiary" was added by the amendment of 1935.

FACTUAL STATEMENT

Some years ago, Gore Properties, Inc., a corporation engaged in the real estate business in the District of Columbia, employed one William F. Hickey as resident manager of the Ritz Apartments, one of its projects. In the summer of 1952, Hickey hired a certain Harry Clifford Porter, a non-commissioned officer in the United States Air Force, to paint the interiors of several apartment units in the development. Hickey knew nothing about the serviceman, other than having seen him in the vicinity in military uniform, and made no investigation whatsoever into his background or character. He put Porter to work painting the apartment of one of the tenants, a young lady who lived alone. Porter murdered the young lady. He was subsequently indicted, but was adjudicated insane and committed to Saint Elizabeth's Hospital; his later trial resulted in a verdict of not guilty by reason of insanity.

After the murder, the victim's Administratrix brought a wrongful death action against Gore, its manager, Hickey, and the American Security and Trust Company, Gore's collection agent, alleging that the Defendants were negligent in hiring Porter without any investigation into his background or character, and in failing to properly supervise and control him. At the conclusion of the Plaintiff's case, the District Court directed verdicts in favor of all Defendants, and the Plaintiff appealed. The Court of Appeals reversed and remanded, as to the Defendants Gore and Hickey. This is reported as *Kendall, Administratrix,* v. *Gore Properties, Inc., et al.,* 98 U.S. App. D.C. 378, 236 F. 2d 673.

The defense of the wrongful death action had been undertaken by Aetna Casualty & Surety Company, under the provisions of a policy of liability insurance which had been issued by it to Gore. Upon remand, Counsel for Aetna effected a settlement of the suit, and the Company paid the settlement amount.

In due course, Aetna, pursuant to the subrogation provisions of the policy which it had issued to Gore, brought an indemnity action against Porter to recover the moneys paid out under the policy in behalf of Gore. This resulted in a judgment in favor of Aetna against Porter, and is reported as *Aetna Casualty & Surety Company* v. *Porter*, 181 F. Supp. 81.[2]

Porter was represented throughout all of the proceedings referred to by Ethelbert B. Frey, Esq., of the District of Columbia Bar, who was appointed Committee for Porter. In this capacity, Mr. Frey received from the Veterans Administration, from time to time, various sums of money representing disability benefits payable to Porter by virtue of his military status.

Some of these moneys were deposited by the Committee in an ordinary checking account (*i.e.*, an account which earned no interest and which was subject to withdrawal on demand) in the First National Bank of Washington. This checking account was used by the Committee to pay the ordinary and usual expenses incident to Porter's maintenance and upkeep. Other sums, however, were invested by the Committee in the Columbia Federal Savings and Loan Association and the Prudential Building Association, both also of the District of Columbia, pursuant to Rule 23

---

[2] An appeal by Porter from this judgment was dismissed by the Court of Appeals, *per curiam*, on October 11, 1960, as "frivolous."

of the Rules of the United States District Court for the District of Columbia, which specifically authorizes the investment of trust funds in institutions of this character.[3]

The moneys so invested in these institutions were converted into share interests, which earned dividends, carried voting and other rights, were evidenced by share account books which contained the rules and regulations of the investment associations, and were not subject to withdrawal on demand except at the pleasure of the institutions.

After obtaining its indemnity judgment against Porter, Aetna issued attachments, and motions for judgments of condemnation, against the moneys deposited in the checking account in the First National Bank and the investment interests in Columbia Federal and The Prudential. The Committee responded with motions to quash which, after hearing, were granted by the District Court, Youngdahl, J., except as to the interest increments attached to the share accounts in Columbia Federal and The Prudential. This is reported as *Aetna Casualty & Surety Company* v. *Porter*, 185 F. Supp. 302. From this judgment Aetna appealed, as to the action of the District Court in quashing the attachments laid against the corpus of

---

[3] The Committee apparently contends (Petitioner's Brief, pp. 4, 5) that the investments in the two savings and loan institutions were made pursuant to an "agreement" between the institutions and the Committee to the effect that no "shares of stock" were purchased, and that the transaction was "the same as in a bank". No such agreement was offered or proved at the trial. Respondent submits that the legal relationship between the Committee and the institutions must be determined by the charters, by-laws, and rules and regulations of the two investment institutions.

the investment accounts in the two savings institutions.[4]

On July 13, 1961, the Court of Appeals, speaking through Chief Judge Miller, with Burger, J., concurring, and Prettyman, J., dissenting, reversed the judgment of the District Court and remanded the case with directions to deny the motions to quash and to grant Aetna's motions for judgments of condemnation against the investment accounts (R. 47-54).

Subsequently, Porter filed a Motion for Rehearing En Banc, which was in due course denied, and thereafter petitioned this Court for *certiorari.*

SUMMARY OF ARGUMENT

In providing for the payment of disability benefits to qualified veterans, Congress did not provide that such benefits should be wholly exempt from the claims of creditors. The judicial history of the exemption statute in this Court has made it abundantly clear that the exemption is only partial, and that, particularly, it is not designed to extend to investments purchased with the benefits by or on behalf of the veteran.

Thus, this Court has previously ruled that the exemption does not extend to land purchased with the benefits (*McIntosh* v. *Aubrey,* 185 U.S. 122, 46 L. Ed. 834, 22 S. Ct. 561, and *Trotter* v. *Tennessee,* 290 U.S. 354, 78 L. Ed. 358, 54 S. Ct. 138), nor to negotiable notes and United States bonds so purchased (*Carrier* v. *Bryant,* 306 U.S. 545, 83 L. Ed. 976, 59 S. Ct. 707).

---

[4] Aetna conceded that the District Court was correct in quashing the attachments laid against the checking account in the First National Bank.

With regard to cash in bank, this Court has held that cash on deposit in an ordinary checking account subject to withdrawal on demand is exempt, although the Court was careful to point out that cash on deposit could, under certain circumstances, "assume the character of investments" (*Lawrence* v. *Shaw*, 300 U.S. 245, 81 L. Ed. 623, 57 S. Ct. 443, 108 A.L.R. 1102).

Thus, it has been quite uniformly held that while cash on deposit in an ordinary checking account is exempt (*Williams* v. *United States Fidelity & Guaranty Company*, 71 App. D.C. 9, 107 F. 2d 210; *cf. District of Columbia* v. *Reilly*, 102 U.S. App. D.C. 9, 249, F. 2d 524; *Surplus* v. *Remele*, 87 N.Y.S. 2d 651, 194 Misc. 1936; *Elbert Sales Company* v. *Granite City Bank*, 192 S.E. 66, 55 Ga. App. 835; *Speer* v. *Pierce*, 77 S.W. 2d 77, 18 Tenn. App. 351), ownership shares in savings institutions purchased with the benefits are investments, and, hence, not exempt from execution. (*In re Bowen*, 49 N.E. 2d 753, 141 Ohio St. 602 (tort judgment); *Hale* v. *Gravellese*, 166 N.E. 2d 557, Supreme Judicial Court of Massachusetts, 1960).

Moreover, the legislative history of the savings and loan institutions has made it equally clear that Congress did not intend the savings and loan institutions to be counterparts of, or substitutes for, banks, but rather, that the Congressional intent was to establish investment institutions in order to promote the common thrift. This is apparent from the literal language of the statute under which these institutions exist, the Home Owners Loan Act of 1933, as amended, 48 Stat. 132, 12 U.S.C. Sec. 1464, and the pertinent regulations, 12 C.F.R. Sec. 541.3, *et seq.* Thus, it has necessarily followed that an owner of a share interest in a savings and loan institution is not to be legally analogized with

a depositor in a bank, *viz.*, he is not a mere creditor, but an investor, whose share-ownership embraces certain distinct indicia which do not attach to the ordinary depositor-bank relationship. The result is that a purchased interest in such a savings and loan institution is legally characterized as an "investment," and, accordingly, under the clear import of the previous rulings of this Court, it is not exempt from attachment under 38 U.S.C. Sec. 3101(a).

ARGUMENT

I. The Exemption Contained in 38 U.S.C. Sec. 3101(a) Is Partial, Not Absolute, and, Under the Prior Decisions of This Court, the Exemption Does Not Extend to Investments Purchased By or On Behalf of the Veteran.

The exemption statute has been before this Court on a number of previous occasions and, it is respectfully submitted, the construction placed upon it has been clear and consistent.

In *Trotter* v. *Tennessee*, 290 U.S. 354, 78 L. Ed. 358, 54 S. Ct. 138, this Court held that land purchased with the benefits was not exempt from taxation. In making it clear that the exemption was not designed to extend to investments, among which it included bonds and shares of stock, the Court, speaking through Mr. Justice Cardozo, said that:

> "We see no token of a purpose to extend * * * immunity to permanent investments or the fruits of business enterprise."

Next came the decision in *Lawrence* v. *Shaw*, 300 U.S. 245, 81 L. Ed. 623, 57 S. Ct. 443, 108 A.L.R. 1102. There, it appeared that the veteran's guardian had merely deposited the periodic government checks or warrants in an ordinary checking account, which drew

no interest and was subject to withdrawal on demand. It was stipulated that the funds in bank were "uninvested balances" of the government payments. In holding that funds so employed were immune, the Court, speaking through Mr. Chief Justice Hughes, said that:

> "The provision of the Act of 1935 that the exemption should not apply to property purchased out of the moneys received from the Government shows the intent to deny exemption to investments, as was ruled in the Trotter case. It is of course true that deposits in bank may be made under a special agreement by which the deposits assume the character of investments and would lose immunity accordingly. No such agreement is shown here. Nor are the bank balances shown to be the proceeds of investments. They are stipulated to be 'uninvested balances' of the government payments. Some reference was made at the bar to the possible effect of an allowance of interest upon bank deposits. It does not appear that there was such an allowance in this instance, and we do not suggest that a mere allowance of interest upon deposits would be enough to destroy an immunity where it would otherwise attach. We hold that the immunity from taxation does attach to bank credits of the veteran or his guardian which do not represent or flow from his investments, but result from the deposit of the warrants or checks received from the Government when such deposits are made in the ordinary manner so that the proceeds of the collection are subject to draft upon demand for the veteran's use. In order to carry out the intent of the statute, the avails of the government warrants or checks must be deemed exempt until they are expended or invested."

The most recent pronouncement of this Court is *Carrier* v. *Bryant*, 306 U.S. 545, 83 L. Ed. 976, 59 S. Ct. 707 (1939). There, the Supreme Court of North Carolina had ruled that negotiable notes and United States bonds which had been purchased with the benefits were not exempt from attachment by a judgment creditor of the incompetent. This Court, relying squarely upon its previous adjudications (*viz.*, *Trotter* and *Lawrence*, *supra*), unanimously affirmed, and, speaking through Mr. Justice McReynolds, said that:

> "The conclusion below is supported by McCurry v. Peek (1936) 54 Ga. App. 341, 187 S.E. 854, the only other opinion squarely upon the point here involved which has been called to our attention.
>
> "The language of section three [now section 3101(a)] although not entirely felicitous, conflicts with the petitioners' insistence.
>
> "The first sentence grants exemption from taxation, claims of creditors, attachment, levy or seizure under any legal process whatever. The things exempted are 'payments of benefits' due or to become due either before or after receipt by the beneficiary.
>
> "Investments purchased with money received in settlement of benefits are not such payments due or to become due. Accordingly, giving the words employed their ordinary meaning, the notes and bonds in question are not exempted by the first sentence in section three. It left them, like other property, subject to taxation, claims of creditors, and legal process.
>
> "The second sentence in the section clearly recognizes the distinction between benefit payments and property purchased with money therefrom. It declares the exemption provisions in

the first sentence shall not attach to claims of the United States; also that exemption from taxation shall not extend to property purchased out of benefit payments. Nothing is said concerning claims of creditors. Nevertheless, petitioners seem to maintain, immunity from these must be inferred. But a mere declaration that investments always subject to taxation shall not enjoy exemption therefrom affords no basis for holding them free from claims of creditors. Although the first sentence extended no immunity to investments, apparently out of abundant caution, the second declared them subject to taxation.

"We find nothing in the history or supposed purpose of the enactment adequate to support a construction not in accord with the ordinary import of the words employed."

The State tribunals have been fully consistent in applying the rule as announced by this Court. An excellent recent example is *In re Bowen*, 141 Ohio St. 602, 49 N.E. 2d 753 (1943). There, a creditor sought to enforce a judgment (based on a tort) against the incompetent's guardian. The Supreme Court of Ohio, affirming a judgment of the Court of Appeals holding that although funds on deposit in an ordinary checking account were exempt, real estate and a savings account were investments and subject to seizure, said that:

"From these decisions [*Trotter, Lawrence*, and *Carrier*] of the highest federal court interpreting federal law, it is clear that in the case at bar the checking account in the bank is exempt from the payment of [the judgment creditor's] claim, but that the real estate is not. The inquiry remains as to whether the savings account at interest should be classed as an investment amenable to the demand of the judgment creditor.

"An 'investment' as that word is commonly used and understood is the placing of capital or laying out of money in a way intended to secure income or profit from its employment [citing cases]. And under Section 10506-41, General Code, the deposit of funds by a fiduciary in a savings account in a national bank located in the State of Ohio or a state bank located in and organized under the laws of the State of Ohio is classed as an investment.

"It is therefore our conclusion that both the real estate and the savings account of the ward are subject to the satisfaction of [the judgment creditor's] judgment, and that the judgment of the Court of Appeals should stand affirmed."

It is pertinent to note that the share interests purchased in the two savings institutions by the Committee at bar are specifically authorized by the provisions of District Court Rule 23, and by it classified as "investments." That Rule, which is entitled "Investment of Trust Funds," provides that:

"Investment of trust funds, unless otherwise provided in the instrument creating the trust, or except under extraordinary conditions set forth fully to the Court, will ordinarily be sanctioned *only* when made in the obligations meeting the following requirements:

"Section II-a. *Federal Savings and Loan Associations, Building and Loan Associations and Savings and Loan Associations.* Investment shares, certificates and deposit accounts in said institutions not exceeding $10,000.00 in one institution, provided such institution is located and doing business in the District of Columbia and its accounts are insured by the Federal Savings and Loan Insurance Corporation under the provisions of

Subchapter IV, Title 12 of the United States Code."

The most recent decision in point is an interesting proceeding emanating from the Supreme Judicial Court of Massachusetts. This is *Hale* v. *Gravellese,* which first came before the Massachusetts Court in 1959, and is reported at 162 N.E. 2d 817. It took the form of a petition by an attorney, addressed to the appropriate Probate Court, for a determination of the amount of compensation due the petitioner for services rendered to an incompetent. The guardian resisted the petition, and was joined in this opposition by the Administrator of Veterans' Affairs of the United States Veterans' Administration. The lower Court awarded the petitioner certain fees and expenses, and the guardian and the Administrator appealed. The Supreme Judicial Court affirmed the award (adjusting the amount), and then turned to the matter of payment. The Court said:

> "But in this case the appellants contend that under 38 U.S.C. (1952) Sec. 454a (now Sec. 3101), the funds of the ward held by the guardian are exempt 'from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'
>
> "Before ordering payment from the estate, it must first be determined whether the funds therein are exempt. It is generally held that the exempt status of pensions after receipt by a beneficiary or his guardian is lost where the proceeds are invested in another form. *Carrier* v. *Bryant,* 306 U.S. 545, 59 S. Ct. 707, 83 L. ed. 976; *McCurry* v. *Peek,* 54 Ga. App. 341, 187 S.E. 854; *In re Bowen,* 141 Ohio St. 602, 49 N.E. 2d 753; *In re Guardianship of Letourneau,* 238 Wis. 473, 300 N.W. 248.

"In order to obtain the requisite facts bearing on the claimed exemption and that the appropriate decree may be entered we retain the case and direct the judge to report the facts as to the present nature and form of the corpus of the guardianship estate, taking further evidence if necessary."

These directions were followed by the lower Court, and in 1960 the case came back before the Supreme Judicial Court, and will be found at 166 N.E. 2d 557 (decided April 28, 1960). The appellate Court said that:

"This case was previously before us. * * * We retained it * * * to obtain from the trial judge findings as to the nature and form of the corpus of the estate held by the guardian in order to determine what part, if any, of the estate is exempt from the claim of the petitioner under 38 U.S.C. (1952), Sec. 454a (now 38 U.S.C.A. Sec. 3101). * * *

"The judge of the Probate Court now reports that it has been the custom of the present and prior guardians to cash the checks received from the Veterans' Administration for a veteran's disability pension, and, after paying outstanding bills of the ward, to deposit the balance of cash in the East Boston Savings Bank in the name of the guardian. From time to time the guardian would withdraw substantial sums from this account and invest the amounts withdrawn in United States Series E savings bonds. On January 13, 1959, when the case was heard in the Probate Court the estate of the ward consisted of such savings bonds totalling $13,500 and a deposit in the savings bank of $6,405.02. * * *

"In view of these findings we are of the opinion that neither the savings bonds nor the savings ac-

> count is exempt from being applied by the guardian in satisfaction of the petitioner's claim. The exemption of a veteran's disability pension does not extend to property in which the pension payments are invested after receipt. *Carrier* v. *Bryant,* 306 U.S. 545, 55 S. Ct. 707, 83 L. ed. 976."

It should be noted that in a decision handed down on the same date as the case at bar, the Court of Appeals for the District of Columbia had occasion to refer to its ruling in this case. That decision is *Wisconsin Bankers Association, et al.,* v. *Robertson, et al., etc.,* No. 16,212 (July 13, 1961) (discussed more fully *infra*). There the Court, speaking through Chief Judge Miller, and referring to this case, said:

> "We recently held that a 'share' in a federal savings and loan association is an investment, and is not equivalent to the deposit of money in a bank."

The remarks of Judge Burger, concurring in *Wisconsin Bankers,* are illuminating. He said that:

> "The superficial similarities of the [federal savings and loan] associations to banks is admittedly very great. But we are concerned not with appearances but with legal realities; it is here that the differences are marked as Judge Miller has pointed out. The capital of a federal savings association is raised by payments on share interests. Calling them 'payments' on 'savings accounts' does not alter their legal status. That the payment may be regarded by the customer as a 'deposit' or even called at times a deposit by the association does not make it a legal counterpart of a deposit in a bank. The 'depositor' in a federal association is not a creditor as is the depositor in a bank. *Anderson Nat. Bank* v. *Luckett,* 321 U.S. 233, 241-2 (1944). He is an investor, as the

> very language of Section 5(b) of the Home Owners Loan Act describes the relationship. The owner of a 'savings account' in the association is entitled to vote, in much the same way as a stockholder in a corporation, to elect the management. The Act under which they exist recites the congressional purpose which emphasizes the 'investment' character of these shares and distinguishes them from the creditor debtor relationship between a bank account depositor and a bank."

Petitioner continues to insist that the funds in question did not "change their identity." The vice inherent in this contention, of course, is that it completely ignores the dispositive finding of the Court of Appeals, *viz.*, that the funds, when changed from the form of cash in bank to investment shares in saving institutions, in legal effect changed their identity, and, hence, lost the benefit of the exemption.

The dissent of Judge Prettyman in the instant case does not, in effect, differ with the majority of the Court of Appeals in their interpretation of the statute. The dissenting Judge would, rather, resolve the problem by a factual inquiry, through testimony by the Committee, as to how much of the assets on hand are actually needed for the upkeep of the veteran. Such amounts Judge Prettyman would characterize as "current deposits," *viz.*, immune from seizure, while the residue would be denominated "investments" and available to a judgment creditor. With utmost respect to Judge Prettyman, there would seem to be a fundamental difficulty inherent in this approach, it being apparent that there is no statutory authorization for such a procedure. The subject of veterans' benefits is entirely one of legislative creation, and Respondent respectfully submits that any implementa-

tion or amplification of the Congressional mandate must be achieved by the legislature itself, or, at the very least, through its delegate, the Administrator of Veterans Affairs, acting under proper authorization.

It is instructive to note that there is, in actuality, no conflict whatsoever among the Courts which have considered the problem now before this Court. The question will nearly always arise on the state-court level, since the estates of incompetent veterans are customarily handled in the appropriate state guardianship or probate Courts. Respondent submits that the state Courts, following the dictates of this Court in its controlling decisions, have uniformly attained the result reached by the majority of the Court of Appeals at bar.

II. Under the Statute and Regulations Governing the Creation and Operation of the Two Savings Institutions Here Concerned, a Shareholder Is Clearly an Investor, Not a Depositor-Creditor. His Interest Being An Investment, It Is Not, Accordingly, Within the Exemption of 38 U.S.C. Sec. 3101(a).

The Home Owners Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. 1464, and the Regulations of the Federal Home Loan Bank Board, 12 C.F.R. 541.3, *et seq.*, are conclusive on the question as to the nature of the shareholders' interest in an investment association which is subject to the provisions of the statute and supporting Regulations.

Section 5 of the Act provides, in pertinent part, that:

> Federal Savings and Loan Associations—
> Organization Authorized.
>
> (a) In order to provide local mutual thrift institutions in which people may *invest* their funds * * *.

Capital; deposits; certificates of indebtedness

(b) Such associations shall raise their capital only in the form of payments on such *shares* as are authorized in their charter, which shares may be retired as therein provided. *No deposits shall be accepted* and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board. (Emphasis supplied)

The pertinent provisions of the Home Loan Bank Board's Regulations provide that:

12 C.F.R. 541.3—Capital. The term "capital" means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

12 C.F.R. 541.4—Savings Account. The term "savings account" means the monetary interest of the holder thereof in the *capital* of a Federal association and consists of the withdrawal value of such interest.

12 C.F.R. 541.5—Short-term savings account. The term "short-term savings account" means a savings account in a Federal association which is to be withdrawn in less than twenty-four months from the date on which such account is opened * * *.

12 C.F.R. 543.3—Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of *local savings* and home-financing.

12 C.F.R. 544.1(a), par. 6—Withdrawals. The association shall have the right to pay the with-

drawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; Provided, That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then pay all withdrawals requested in accordance with such methods and procedures as to amounts and allotments of funds for such purposes as shall be provided in regulations made by the Federal Home Loan Bank Board in effect at the date of the request for withdrawal. *Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.* (Emphasis supplied).

12 C.F.R. 545.1—Savings accounts.— The *capital* of a federal association may be raised through payments on its savings accounts * * *.

12 C.F.R. 545.2—Evidence of ownership.—(a) Signature card. In connection with the issuance of a savings account a Federal association shall obtain a card containing the signature of the owner of such account * * * (b) Account books and certificates. A Federal association that has Charter N shall issue to each holder of its savings account *an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association;* * *. (Emphasis supplied)

The statute and the Board's Regulations were recently construed by the District Court and the Court of Appeals for this Circuit. This is, of course, *Wisconsin Bankers Association, et al.*, v. *Robertson, et al.*,

etc., 190 F. Supp. 90, *affirmed*, — F. 2d —, July 13, 1961, *certiorari denied*, 368 U.S. 938, 7 L. Ed. 2d 338, December 11, 1961.

It is respectfully submitted that the *Wisconsin Bankers* decision bears a vital relationship to the case at bar, and merits detailed analysis.

The case took the form of an assault on the Federal Home Loan Bank Board by a Wisconsin banking association, several Wisconsin state-chartered banks, and a Wisconsin national bank, the plaintiffs contending that the Board's Regulations of 1949 were illegal and invalid in that they permitted federal savings and loan associations to accept "deposits" on "savings accounts," in violation of the Congressional dictate that "deposits" could not be accepted by such associations, who must raise their capital in the form of payments on their authorized "shares."

Specifically, the plaintiffs contended that although Section 5 of the Home Owners Loan Act of 1933, as amended, *supra*, provided that the associations should raise their capital "*only* in the form of payments on such *shares* as are authorized in their charter(s)," and that "No deposits shall be accepted," the Regulations, in providing that the capital of an association "may be raised through payments on its *savings accounts*" (12 C.F.R. 545.1), in defining capital as "the aggregate of the payments on savings accounts" (12 C.F.R. 541.3), and, finally, in defining "savings account" as the "monetary interest of the holder thereof in the capital of a Federal association" (12 C.F.R. 541.4), in effect unlawfully permitted the associations to raise capital by payments on "savings accounts" rather than on "shares," thus permitting

the associations to go into "the banking business" in competition with the plaintiffs.

The District Court, in a well-reasoned opinion by Judge Tamm, upheld the validity of the 1949 Regulations, and rejected the plaintiffs' contentions (190 F. Supp. 90.) On appeal, a unanimous Court (*per* Miller, C. J., and Bazelon and Burger, JJ.) affirmed. The Court said that:

> "The appellants principally rely for support of their theory of illegality upon the 1949 regulation which defines 'capital' as 'the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.' Whether this regulation is in accord with Section 5(b) of the Act depends upon the meaning of the term 'savings account.' If it means an account similar to a savings account in a bank with respect to which the bank is debtor to the depositor the regulation is repugnant to Section 5(b), for two reasons: (a) payments on such savings accounts cannot be payments on 'shares' of capital, as contemplated by the statute, and (b) it violates the provision that 'No deposits shall be accepted. . . .' On the other hand, if the term 'savings accounts' was used to mean 'shares' of an association's capital, the regulation is in accord with Section 5(b).
>
> "The section of the 1949 regulations which defines capital in terms of payments on savings accounts is immediately followed by a section which defines the term 'savings account' as 'the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.' It seems quite clear, therefore, that the words 'savings accounts' in the regulation defining 'capital' have the same meaning as the word 'shares' in the statutory provision governing the raising of capital."

Thus, the Court of Appeals in *Wisconsin Bankers* squarely ruled that an account in a federal savings and loan association is a share interest in the association's capital, and not the same as a deposit in bank, and, in effect, that such a share interest is an investment made by the purchaser, and not a mere debt owing to him. This, of course, accords perfectly with the result reached by the majority of the Court on the same day in the case at bar.

The position which the Solicitor General took in *Wisconsin Bankers* should not be ignored. From its Brief in that case (No. 502, October Term, 1961, pp. 7, 8) it is apparent that the Government conceded that:

> "From these regulatory provisions it is clear that, whatever their similarities in name and practical operation, the savings accounts authorized by the regulations are not the legal counterpart of a deposit in a bank, and the relationship of holders of savings accounts to the associations is significantly different from the debtor-creditor relationship that exists between a depositor and a bank. * * *
>
> "Unlike petitioners' depositors, however, members of an association holding savings accounts pay for a share of capital, as Section 5(b) requires; and though they may withdraw their interests, they are subject to a waiting period, as well as a proration of funds in the event of an emergency. They are share-owners, not depositors. * * *
>
> "Our position is that the challenged regulations create procedures and legal interests significantly different, in legal contemplation, from the type of deposits proscribed by Section 5 of the Home Owners Loan Act."

The Solicitor General, thoughtfully, added that:

> "The government's positions in [Porter v. Aetna] and this case are fully consistent."

Whether or not the Government's positions in these two cases are in fact reconcilable is a matter of interpretation, and dispute.

In its analysis of this Court's previous decisions, the Government discerns certain criteria which, it contends, are determinative of the question as to the extent of the exemption. Essentially, it points to the language of Mr. Justice Cardozo in *Trotter* v. *Tennessee*, *supra*, to the effect that "there was an end to the exemption when they [the benefits] lost the quality of moneys," together with the Court's use of the expression "permanent" investments. Then follows the argument that the moneys used to purchase the investment shares in the two savings institutions at bar did not lose their "quality" as moneys, and that the investment shares so purchased are not "permanent" investments within the purview of this Court's decisions.

The Respondent respectfully submits that when funds are used for the purchase of investment interests in savings and loan associations, to which interests are attached distinct legal rights and obligations which are not indigenous to the funds themselves, and which interests are evidenced by written instruments of ownership, the funds have, in a very practical (as well as legal) sense lost the "quality" of moneys. It is helpful to bear in mind that this Court has already made it clear that funds used for the purchase of "bonds" and "shares of stock" (*Trotter* v. *Tennessee*), and "negotiable notes" and "United States bonds" (*Carrier* v.

Bryant) have, under the exemption statute, lost the quality of moneys.

With regard to the "permanency" of the investment, and aside from the necessarily subjective aspects of this consideration, the Respondent submits that, under the Home Owners Loan Act, and the Regulations, an obvious—and quite adequate—apparatus for "permanent" investments is created. Indeed, it is interesting to note that, under 12 C.F.R. 541.5, *supra*, an investment interest which is to be withdrawn in less than twenty-four months is regarded as a "short-term" savings account. From this, it may be suggested that an investment interest which is not to be withdrawn within this time is to be regarded, under the Regulations, as a "long-term" or "permanent" investment.

It should be noted that the Government stresses (pp. 25-26 of its Brief) the "pertinent similarities" between an account in a savings bank and an account in a federal savings and loan association. This is achieved on the assumption—frankly set forth on page 15 (footnote 17) of the Brief—that the exemption applies to moneys in a savings account "regardless of whether the account is in a savings bank, commercial bank, or in a savings and loan association."

The Court, however, is not asked to determine whether the exemption of 38 U.S.C. Sec. 3101(a) applies to an account in a "savings bank," as distinct from an account in a federal savings and loan institution, since such an account is not before the Court, except, perhaps, gratuitously. Moreover, the assumption fails to differentiate between the various types of savings banks and savings accounts therein which, as a matter of common knowledge, are available to investors in this country.

CONCLUSION

The Respondent respectfully submits that the majority of the Court of Appeals properly found that the share interests maintained by the Committee at bar are investments and, accordingly, are not within the ambit of the exemption statute.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

JOHN L. LASKEY
RICHARD WHITTINGTON WHITLOCK
LASKEY and LASKEY
509 Albee Building
Washington 5, D. C.
Attorneys for the Respondent